IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.486 OF 1994

Dadasaheb Dhondiba Jagtap
res. at Saswad (Tathewadi)
Tal: Pandharpur,
Dist: Pune. ..Appellant
(Org.Plaintiff)

Versus

Anant Shivram Poman
Tal: Pandharpur,
Dist: Pune ..Respondent
(Org.Defendant)

with
SECOND APPEAL NO.489 OF 1994

Dadasaheb Dhondiba Jagtap ..Appellant
(Org. Defendant)

versus

Anant Shivram Poman ..Respondent
(Org. Plaintiff)

Mr.S.J.Rairkar for the appellant

Mr.C.G.Gavnekar for the respondent

CORAM: S.R.SATHE, J.

DATE : 18th July, 2005

JUDGMENT

1. The Appellant Dadasaheb Jagtap, the original plaintiff, in Regular Civil Suit No.101 of 1980 and the defendant in Regular Civil Suit No.131 of 182, has preferred these two appeal against the Judgment and Order passed by the Court of 3rd Additional District Judge, Pune in Civil Appeal No.196 of 1987 and Civil Appeal No.197 of 1987, whereby, both the said appeals were allowed and the decree for specific performance

granted by the Court of CJJD, Saswad, in favour of the Original Plaintiff was set aside and the order passed in Regular Civil Suit No.131 of 1982 was also set aside and the suit filed by Anant Poman, the present respondent was decreed in his favour and present appellant Dadasaheb Jagtap was directed to hand over possession of the suit property to Anantrao Poman.

2. Brief facts giving rise to these two appeals are as under :

. The suit property bearing Survey No.114 situated at Village Supla, Taluka: Purandar, District Pune is owned by the respondent. On 12.6.1972 he agreed to sale 2 Ane 5 paisa share out of the suit land to appellant for Rs.14,000/- and executed an agreement to sale in favour of the appellant. The appellant had paid Rs.3000/- to respondent on 24.4.1972. On the date of the agreement he paid an additional amount of Rs.2000/- and thus the respondent agreed that out of the sale price of Rs.14,000/- he received Rs.5000/- towards the transaction by way of earnest money. On the date of the agreement the respondent handed over possession of the suit property to the Appellant and accordingly Accordingly, necessary statement was made in the agrement. As per the terms and conditions of

the agreement the sale deed of the property was to be executed within one month from obtaining necessary permission from the concerned authority for the said sale transaction. It was also agreed that if the appellant fails to get the sale deed executed within time as agreed then the amount of earnest money would be fortified and if the respondents fail to execute the sale deed, then the appellants would be at liberty to get the sale deed executed through Court. According to appellant after the agreement to sale, both the parties submitted joint application to the concerned authorities seeking permission for the sale transaction. However, in August 1997 it transpired that there was no necessity to seek permission and thus the hurdle in getting the sale deed executed was removed. The appellant thereafter, asked the respondent from time to time to execute the sale deed. However, the respondent avoided. The Appellant was paying the taxes of the suit property. On 1.5.1980 when the Appellant was suplying water to his land, the Respondent obstructed and told him that he would sale his land to some other person. Hence on 30.5.1980 the Appellant filed Regular Civil Suit No.101 of 1980 against the Respondent for declaration and permanent injunction restraining the Respondent from obstructing the Appellants possession of the suit land.

Alternatively, he also prayed for specific performance for agreement to sale. However, he paid the Court Fee Stamp only on his claim with regard to declaration and injunction.

3. On the date of filing of the suit, the Appellant also filed Applciation Exhibit 6 for temporary injunction. The Respondent filed his written say Exhibit 16 and opposed the said application and contended that there was no transaction of agreement to sale and he had only obtained Rs.5000/- by way of loan from the Appellant. He also contended that the Appellant has not given the boundaries of the land alleged to have been handed over to him and as such the suit is not maintainable. The respondent subseuently filed pursis and took same contentions in his written statement. During the pendency of the said suit the trial Court was pleased to grant ad interim injunction against the respondent.

4. On 18.8.1982, the respondent, owner of the suit land filed Regular Civil Suit No.131 of 1982 against the present Appellant and prayed for declaration and possession. He contended that the Appellant did not take any action for getting the sale deed executed , though the condition for seeking permission from the

concerned authority was cancelled. He, therfore, prayed for declaration that the agreement dated 12.6.1972 has come to an end and prayed for the possession of the suit land from the Respondent.

5. On the pleadings of the parties, the Trial Court framed issues in both the suits. Both the parties decided to adduce common evidence and accordingly evidence was recorded in Regular Civil Suit No.101 of 1980. The Plaintiff examined himself at Exhibit 55 and witness Nathu Jagtap at Exhibit 82. As against this, the Defendant No.1 did not examine himself but only examined one witness Balasaheb Shirsagar-Exhbit 97. Both the parties produced certain documents. After considering the evidence adduced by both the parties, the learned Trial Judge came to the conclusion that the Defendant-Transferor committed breach of Agreement to Sale and that the Plaintiff-transferee was always ready and willing to perform his part of the Contract. The learned Trial Judge, therefore, granted decree for specific performance in favour of Plaintiff in Regular Civil Suit No.101 of 1980 and dismissed the Transferor’s suit bearing No.131 of 1982.

6. Being aggrieved by the above mentioned order,

the transferor Anantrao S. Poman filed two appeals bearing Civil Appeal No.196 of 1987 and 197 of 1987 against the Judgment and Order passed in Regular Civil Suit No.101 of 1980 and Regular Civil Suit No.131 of 1982 respectively. Both these appeals were allowed by the 3rd Additional District Judge, Pune and he held that the transferee was not ready and willing to perform his part of contract. He, therefore, dismissed the Regular Civil Suit No.101 of 1980 and directed the transferee to hand over the possesion of the suit property to the transferor and accordingly passed decree in favour of the transferor.

7. Being aggrieved by the above mentioned common judgment and order passed in the Regular Civil Appeals, the transferee Dadasaheb Jagtap, the Original Plaintiff in Regular Civil Suit No.101 of 1980 and defendant in Regular Civil Suit No.131 of 1982 has filed the present two second appeals.

8. From perusal of the record of the Second Appeal No.486 of 1994 it appears that while admitting the said appeal this Court has passed the following order:

> "Admit. Substantial question of law involved is mentioned in ground b to e"

The said grounds are as follows:

b) Whether the Statutory Protection to continue the possession under the contract is lost, once the Specific Performance is refused to the transferee or cannot be granted in his favour on account of some legal impediments, such as bar of limitation etc.

c) The transferee if cannot get the Specific Performance of contract in his favour, whether is liable to deliver the possession received by him in part performance of the contractr, to the transferor, even if the transferor fails to establish his case with regard to the declaration and the recovery of possession of such immovable property.

d) The parties to the suit when proceed in the trial by filing the necessary pleadings and leading the evidence with regard to one particular issue in their mind, in the absense of same being framed by the Trial Court, but discussed in some other co-related issue/s, whether cannot be considered by the Appellate Court(s).

e) Whether the provisions of Order XLI, Rule 31 of the Code of Civil Procedure, 1908 are mandatory which imply that the judgment of the First Appellate Court has to set out the points for determination, record its decision thereon and give its own reasons for the said decision.

While admitting the Second Appeal No.489 of 1994 this

Court has passed the following order:

"Admit. Substantial question of law is

mentioned in grounds a to d"

The said grounds are as follows:

a) Whether the Statutory protection to continue the possession under the contract is lost, once the Specific Performance is refused to the transferee or cannot be granted in his

favour on account of some legal impediments, such as bar of limitation etc.

b) The transferee if cannot get the Specific Performance of contract in his favour, whether is liable to deliver the possession received by him in part performance of his contract, to the transferor, even if the transferor fails to establish his case with regard to the declaration and the recovery of possession of such immovable property.

c) The parties to the suit when proceed in the trial by filing the necessary pleadings and leading the evidence with regard to one particular issue in their mind, in the absence of the same being framed by the Trial Court, but discussed in some other co-related issue/s, whether cannot be considered by the Appellate Court(s).

d) Whether the provisions of order XLI, Rule 31 of the Code of Civil Procedure, 1908 are mandatory which imply that the judgment of the First Appellate Court has to set out the points for determination, record its decision thereon and give its own reasons for the said decision.

Though several substantial questions as mentioned above have been framed by this Court, finally while arguing the matter both the learned Advocates submitted that the only point or substantial question of law that is to be decided in this appeal is whether the transferee was and is willing to perform his part of contract and whether the finding recorded by the First Appellate Court on this point is legal or not. Secondly, Shri Rairkar, learned Advocate for the Appellant submitted that the transferee has received the possesion of the suit land by way of part performance and as such he is

entitled to protect the possession and the decree passed against him by the First Appellate Court is not legal and correct. As against this, Shri Gavnekar, learned Advocate for the respondent-transferor supported the judgment and order passed by the First Appellate Court.

9. It is not in dispute that the suit land is owned by Anantrao Shivram Poman, the transferor and he executed an agreement to sale-Exhbit 56 in favour of Dadasaheb Jagtap-transferee on 12.6.1972 and agreed to sell the suit land to him for Rs.14,000/- and admitted that he received in all Rs.5000/- towards consideration and he handed over the possession of the suit land to transferee Dadasaheb Jagtap. It is also an admitted fact that by virtue of stipulation embodied in the said agreement, permission from the competent authority for the said transaction was to be obtained. Ofcourse, the agreement was silent with regard to who was to submit application in that behalf and take necessary steps. Admittedly, it is mentioned in the said agreement Exhibit 56 that balance consideration is to be paid within one month from the receipt of the permission and if the sale deed is not executed within the above mentioned period then the amount of earnest money would be forfeited. It is not in dispute that since August

1974 there was no necessity to seek permission and there was no any hurdle in executing the sale deed on that count. It is also admitted that the transferor was put in possession of the land in question on the dateof agreement to sale, by way of part performance.

10. The first and foremost question which falls for consideration is whether the transferee was and is ready and willing to perform his part of the contract and whether there was compliance of Section 16(1)(c) of the Specific Relief Act. Admittedly, sale deed was to be executed after obtaining necessary permission from the concerned authority. However, if we peruse the averments in the plaint, in Regular Civil Suit No.101 of 1980 i.e. the suit filed by the transferee we find that therein he has clearly mentioned that the hurdle or difficulties in executing the sale deed came to an end by August 1977 and thereafter the Plaintiff (Transferee-Dadasaheb Jagtap) was asking the transferor to execute the sale deed, but the transferor was avoiding it. When such was the position it was absoultely esential for the transferee to file a suit for specific performance of an agreement to sale against the transferor. But, admittedly, the transferor kept mum for a long time and finally in the year 1980 he filed suit against the transferor alleging

that he is trying to sell the land to some other person and hence on that ground prayed for permanent injunction. It is pertinent to note that the said suit was also initially a suit simplicitor for permanent injunction. It is true that in that suit alternatively he had prayed for specific performance of agreement to sell, but, adimittedly, even while doing so, the transferee had not paid the necessary Court fee stamp. We cannot ignore the fact that admittedly, right from the year 1972 i.e. from the agreement to sale, the transferee was in actual possession of the suit land. He was cultivating the same and taking yield out of the said land. So, as he was getting the fruits of the said land without paying the balance amount, he preferred not to file a suit for specific performance, but only filed suit for permanent injunction. This conduct, in a way, clearly establishes that he was not ready and willing to perform his part of the contract, namely to pay the balance consideration and get the sale deed executed. He wanted to take disadvantage of the fact that he was put in possesion of the land in question. That is why we find that at no point of time he issued any notice to the transferor and called upon him to execute the said deed. Even if we peruse the entire evidence of plaintiff, it is quite evident that he had not actually shown willingnes to pay the balance

amount nor actually gone to the house of the defendant with balance consideration. He has only made an attempt to show that he had sent some third person to the transferor for requesting him to execute the sale deed. It was also argued on behalf of the transferee that even after the agreement to sale he has paid certain amount to the transferor and it indicates that he was ready and willing to get the sale deed executed. It is true that after 1972 some very small amounts were paid to the transferor, but that was also in 1973 and thereafter no payment was made and thus in all out of Rs.14,000/-, an amount of Rs.8041.77p was only paid. At the cost of repetition it must be mentioned that no subsequent attempts were made by the transferee to make full payment.

11. It is well settled that transferee must aver and prove that he was and is ready and willing to perform his part of the contract. In the instant case, there are no specific averments with regard to readiness and willingness. Moveover, the facts, and circumstances and the conduct of the transferee establish that he was not ready and willing to perform his part of the contract. The finding recorded by the First Appellate Court cannot be said to be against the evidence on record. The same is legal and correct.

12. Shri Rairkar, ld. Advocate for the Appellant transferee canvassed before me that in the instant case the transferee has actually received the possession of the suit land by way of part performance. As per the provisions of Section 53(A) of Transfer of Property Act he is entitled to protect his possession. So, according to him even if the amendment with regard to specific performance was carried out by the transferee in his plaint in the year 1985 and as such, barred by limitation, still the transferee is protected by virtue of the provisions of Section 53(A) of the Transfer of Proeprty Act. For this, he has placed reliance on a case Mahadeo Nathuji Patil v/s. Surajbhai Khushalchand Lakka, 1994 Mh.L.J.1145, wherein the full bench of this High Court has observed that the statutory protection granted under Section 53(A) of the Transfer of Property Act to Transferee in possession to continue his posession under an unregistered contract or instrument of transfer is not lost by lapse of time to file suit for specific performance of contract for acquiring title, if he satisfies the essential requirements of Section 53 (A) of the Tranfer of Property Act. The ratio of the above said ruling is not disputed and cannot be disputed. However, the main question is whether the transferee is entitled to protect his

possession particularly when it appears that he had not taken necessary steps to get the sale deed executed and consequently not shown his readiness and willingness to perform his part of the contract. In order to answer this question useful refernce can be made to a case, Srimant Shamrao Suryavanshi and Anr. V/s. Pralhad Bhairoba Survayanshi & Others (2002) 3 SCC, pg.676, wherein their Lordships of the Apex Court approved the view of the full Bench of this High Court mentioned above and further observed that if the transferee wants to defend or protect his possession under Section 53(A) of the Transfer of Property Act, the necessary conditions are :

(1) there must be a contract to transfer for consideration of any immovable property.

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(3) the writing must be such words from which the terms necessary to construe the transfer can be ascertained;

(4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;

(5) the transferee must have done some act in furtherence of the contract;

(6) the transferee must have performed or be willing to perform his part of the contract.

In the present case the condition no.6 is not fulfilled by the transferee. Naturally in the instant he is not

entitle to protect his possession under Section 53(A) of the Transfer of Property Act. So, under such circumstances the First Appellate Court was right in holding that the transferee is not entitled for specific performance of the Agreement to Sale. On the contrary he is bound to hand over the possession to the original owner namely the transferor and can't retain it by relying on Section 53(A) of the Transfer of Property Act.

13. The Judgment and order passed by the First Appellate Court is legal and correct. There is no need to interfere with the same. In this view of the matter, there is no substance in both the appeals. Hence both the appeals are dismised with costs.

14. At this stage Shri Rairkar, learned Advocate for the Appellant, on instructions submitted that the present Appellant intends to challenge the order in these two appeals in the Supreme Court and as such the parties be directed to maintain status quo for a period of eight weeks.

15. The learned Advocate appearing for the Respondent opposed and submitted that as the original transaction has taken place in the year 1972 and since

then the Original Owner is out of possession of the suit property, status quo may not be granted.

16. Admittedly, since the date of original transaction i.e. 12.6.1972 the present Appellant is in possession of the suit property. So, considering the peculiar facts of the case and with a view to enable the Appellant to approach the Apex Court, the Appellant to hand over the possession of the suit property to the Respondent within eight weeks from today. The Appellant is directed not to create any charge or encumbrance on the suit property or create third party interest in the suit property .

(S.R.SATHE, J.)